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In the Supreme Court of the United States

OCTOBER TERM, 1986

VICKEY DORSEY AND TIMOTHY D. MCCOLLUM, PETITIONERS

v.

THE UNITED STATES POSTAL SERVICE AND
GEORGE T. HOWARD, POSTMASTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that their Fifth Amendment due process rights were violated when respondent Howard, the Postmaster in Rome, Georgia, refused to hire them as substitute rural letter carriers.

1. Petitioners filed identical complaints in the United States District Court for the Northern District of Georgia naming Howard, in his individual capacity, and the United States Postal Service as defendants. Petitioners alleged that their Fifth Amendment rights were violated when Howard refused to hire them because of personal dislike for them

and their family (Pet. App. 7).[1] Petitioners sought employment, back pay, and monetary damages (*id.* at 8).[2]

The district court granted summary judgment for Howard and the Postal Service, concluding that petitioners' claims implicated neither a property nor a liberty interest protected by the Due Process Clause. Specifically, the court found that petitioners had stated "no more than a claim of eligibility for employment with the postal service," a claim falling far short of any "legitimate claim of entitlement" (Pet. App. 6-7). The court also found that petitioners had failed to allege any publication of the Postmaster's decision sufficient to cause a stigma to attach to their reputation in the community (*id.* at 7). The court of appeals affirmed in a per curiam opinion (*id.* at 2), agreeing that petitioners "failed to identify any constitutional property or liberty interest" upon which to base their claims (*ibid.*).

2. The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits, and there is no conflict with any decision of this Court. The case presents no significant legal question and warrants no further review.

a. Petitioners have no constitutionally protected right to be hired as substitute rural letter carriers. "To have a property interest in a benefit, a person clearly must * * * have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Petitioners have only established that after passing the relevant tests they were eligible

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[1]Petitioners' mother and brother were already employees of the Post Office in Rome, Georgia.

[2]Petitioners assert (Pet. iii) that the Postal Service has no interest in the outcome of this petition since only their claims against the Postmaster in his individual capacity are being raised here. Petitioners, however, have not expressly dropped their prayer for employment and back pay, and that relief if granted would run against the Postal Service.

to be hired. Such eligibility for employment constitutes at best a "unilateral expectation" of the sort found insufficient to establish a property interest in *Roth*. The Due Process Clause is not a restraint on discretionary personnel decisions, even where incorrect or ill-advised. *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976) (footnote omitted) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs.").

Petitioners' reliance (Pet. 12-14) on Postal Service regulations to establish an entitlement to employment is misplaced. Nothing in those regulations requires that employment decisions be based exclusively on test scores or any other readily quantifiable factor. USPS, *Handbook P-11, Personnel Operations* at Section 265.12 (May 30, 1980).[3] Although a hiring official may not discriminate against an applicant on the basis of race, religion, color, sex, national origin, age or physical handicap (*id.* Section 264.1), he may consider any factors relevant to the applicant's potential job performance (*id.* Sections 265.121 and 265.123). The only explicit restriction on his hiring authority is that he must follow "the Rule of Three," which requires his selection to be made from among the three highest-rated applicants (*id.* Section 264.2). There is no suggestion that respondent Howard failed to follow that rule, nor is there any other basis for petitioners' claim that they were somehow entitled to the jobs for which they applied.[4]

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[3]Relevant sections of this Handbook were printed in the appendix to the brief filed by respondents in the court of appeals.

[4]Petitioners err in relying (Pet. 14) on *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957). In that case, an individual challenged the Board's refusal to allow him to take the state bar examination. Under the relevant state law, the Board could do so if the applicant

b. Petitioners have also failed to assert the violation of any liberty interest protected by the Due Process Clause. Petitioners rely exclusively (Pet. 8, 15) on respondent Howard's statement, made to a Postal Service Examinations Specialist in Atlanta, Georgia, that petitioners were impossible to work with or around. Such a statement is hardly a "badge of infamy" of the sort that concerned this Court in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). Nor does it amount to government action foreclosing petitioners from other employment. *Board of Regents* v. *Roth*, 408 U.S. at 573. See also *Paul* v. *Davis*, 424 U.S. 693, 708-710 (1976).[5]

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failed to demonstrate "good moral character." This Court found that the evidence supported the applicant's assertion that he did have a good moral character and concluded that the Board had engaged in constitutionally invidious discrimination based on his former membership in the Communist Party. In the instant case, by contrast, there is no invidious discrimination, but at most a personality clash between petitioners and the Postmaster. And the instant case involves, not the opportunity to take an examination purportedly open to all qualified persons, but a necessarily discretionary choice between qualified persons for a fixed number of jobs.

[5]In *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976), this Court held that a Civil Service Commission regulation excluding noncitizens, including lawfully admitted resident aliens, from the federal competitive service deprived such resident aliens of liberty without due process in violation of the Fifth Amendment. In this case, by contrast, there has been no allegation that any regulations excluded petitioners from all employment with the Postal Service, nor that the Postmaster's statement has de facto resulted in such exclusion. Furthermore, unlike alienage, the inability of an applicant to get along with co-workers is not a constitutionally suspect ground for denying him employment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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